been numerous, both in regard to railways, and the furniture and equipment of railways, and some of which have already been determined by our courts in favor of the equitable right of the mortgagees, without seeming to comprehend very fully the equitable grounds upon which they may be made to stand. See also *Hart* vs. *Farmers' and Mechanics' Bank*, 33 Vt. R. 252; *Pennock* vs. *Coe*, 23 Howard U. S. Rep. 117, where Mr. Justice NELSON and the counsel in argument go into an exhaustive examination and discussion of this question in all its bearings, and the learned judge arrives at the same just conclusion, substantially, with that already indicated as being reached by the House of Lords.

I. F. R.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States—December Term, 1862.

THE CITY OF CHICAGO, PLAINTIFF IN ERROR, *vs.* ALLEN ROBBINS.

A., being the owner of real estate situated upon a street in a city, contracted with B. to erect a building thereon, which included an excavation of the sidewalk adjoining, so as to furnish light and air to the basement. Other contractors were employed to furnish gratings and flagging. Excavations in the sidewalk of a dangerous character were made by the contractor in the course of the work, to which the attention of A. was called by the city authorities. The city knew of the excavation of this and similar areas, and interposed no objection, though no express permission to make this one was given. While this condition of things continued, C. fell into the unprotected area and was injured. He brought an action against the city to recover damages. A. had knowledge of the pendency of the action, but he was not expressly notified to defend it; nor was he informed that the city would look to him for indemnity. A judgment was recovered against the city, which it was compelled to pay. In an action brought by the city against A., to be reimbursed the amount which it had paid under the judgment, *Held*,

1. Assuming that C. was injured through the fault of A., and that the city was not a wrongdoer, A. is concluded by the judgment recovered against the city. No express notice to him of the pendency of the action was necessary. It is enough that he knew it was pending, and could have defended it.
2. The excavation, though not a nuisance in itself, became such on account of the improper manner in which it was made. The city is not, however, for that

reason a wrongdoer, in such a sense as to lose its right of action against A. No license from the city to leave the area open and unguarded can be presumed.

3. The defendant was under an obligation to have the work done in such a way as to save the city from damage and the public from harm. He cannot escape liability by letting out the work to a contractor. The work having been done in such a manner as to render the city liable in the first instance, the defendant is answerable to it for the amount which it was compelled to pay.
4. The case of *Hilliard* vs. *Richardson*, 3 Gray 349, distinguished, and the case of *Scammon* vs. *The City of Chicago*, 25 Illinois 424, so far as it conflicts with these principles, overruled.

In error to the Circuit Court of the United States for the Northern District of Illinois.

Elliott Anthony, of Chicago, for plaintiff in error.

S. W. Fuller, for defendant in error.

Mr. Justice DAVIS delivered the opinion of the Court.

This is an action on the case brought by the City of Chicago against Robbins. The suit was originally commenced in the Cook County Court of Common Pleas, one of the State Courts of Illinois. It was transferred, in pursuance of the Act of Congress, on the petition of Robbins that he was a citizen of New York, to the Circuit Court of the United States for the northern district of Illinois, where there was a trial by jury on the 10th day of April, 1860, on the plea of not guilty, and the issue found for Robbins. There was a motion for a new trial, which was overruled by the Court, and on the 28th day of May, 1860, judgment was entered on the verdict of the jury. The decision of Circuit Courts on motion for new trials is not subject to review, and this case is here on exceptions taken to the charge of the judge to the jury.

The declaration alleges: That the plaintiff is a corporation by the laws of Illinois, having exclusive control over the public streets, and bound to protect them from encroachment and injury. That Robbins was the owner of a lot on one of the public streets, and wrongfully excavated in the sidewalk next to and adjoining his lot, an area of great length, width, and depth, and wrongfully suffered the same to remain uncovered and unguarded, so that one William H. Woodbury, on the night of the 28th of December, 1856, while exercising reasonable care and prudence in passing along the street,

fell into it and was greatly injured. That Woodbury brought suit against the city, in said Cook County Court of Common Pleas, and at the June term, 1857, of the said Court recovered a judgment for $15,000 and costs, which the city has been forced to pay, and that although the city is primarily liable, yet Robbins is responsible over to it for the amount of the judgment, interest, and costs so recovered. The case as shown by the bill of exceptions is this: Robbins, owning a lot in Chicago, on the south-east corner of Wells and South Water streets, on the 20th of February, 1856, contracted in writing with Peter Button to erect a building thereon, which included an excavation of the sidewalk next to and adjoining it, so as to furnish light and air to the basement. The contract contained a stipulation that Button was to be liable for any violation of city ordinances in obstructing streets or sidewalks, or accidents resulting from the same. Possession of the ground, in order to erect the building, was given to Button, by the terms of the contract, on the 1st day of April, 1856. The area was dug early in the spring and covered up temporarily with joists, which often got displaced, and during the summer and fall it was frequently uncovered and dangerous. The flagging was laid some time in the fall and the iron gratings afterwards, with which Button had nothing to do.

There were seven different contractors on the building, in all, on different parts of the work. Letts had the contract for the iron gratings, and Cook & Co. for the flagging. Robbins was in Chicago, and occasionally at the building, during the summer, and was there while excavations were going on, and was spoken to frequently by the city superintendent upon the dangerous condition of the area. At one time after the flagging was laid, and ice was or had been on the flagging, he called Robbins's attention to the condition of the area, and suggested the mode in which it should be covered up, "telling him that if it was sleety and people were passing rapidly they might slip in, and that somebody's neck would be broken if the covering was not attended to," and he replied "that he would see to it, but that the matter was in the hands of his contractor, and he would speak to him about it." Before this, the head clerk in the office of the city superintendent wrote Robbins

a note and put it in the post office, notifying him of the danger of the whole front of the sidewalk. The area was usually entirely open after the flagging was laid, until after the grating was all done, and was open until after the accident. There were lamps at bridges, and a lamp at alley, sixty-four feet from the building. The width of sidewalk, including area, was sixteen feet. The area was four feet ten inches wide. The grade of Wells street was changed by the corporation; the sidewalk was raised eight inches higher than it was, to accommodate it to the grade of the street; it was raised in July or August, 1856, and Robbins directed Van Osdell, his architect, to raise the sidewalk to the grade. Van Osdell superintended the erection of the building for Robbins, who paid him; his duty as superintendent was to see "that the work was done according to contract; to see that the work and material were according to specification, and make estimates." Button was told of the dangerous condition of the area, and spoke several times to his foreman about it. Button was to finish his work under the contract by the 1st of September, but did not in fact complete it until February, 1857. On the night of the 26th of December, 1856, the area was not sufficiently covered, and Woodbury fell into it and was injured, and sued the city and recovered in manner as stated in the declaration. Marsh was city attorney in 1856, and when the suit was begun he made preparations for its defence, and ascertaining that Robbins owned the building, applied to him to assist him in procuring testimony; Robbins told him of a witness who knew something of the suit, and promised to write to him, and afterwards informed Marsh that he had done so; the evening before the trial he casually met Robbins, and told him that the suit would be tried the next day; he did not go expressly to notify him to defend the suit, and never notified him that the city would look to him for indemnity. Evidence was given tending to show that the city authorities knew of the excavation of this area and of other areas similar to this at different times, and interposed no objection, though no express permission to make this one was given.

The defendant introduced in evidence the following provision of the ordinances of the city of Chicago, viz.:

"ARTICLE II—OBSTRUCTIONS. CHAPTER LIII., SECTION 1.

"*Be it ordained by the Common Council of the City of Chicago*, That no porch, galley, stoop, steps, cellar-door, stair-railing, or platform, erected or to be erected within the city, shall be allowed to extend into or upon any sidewalk where the street is less than seventy feet in width, more than four feet; nor more than five feet, where the street is seventy feet and upwards in width. Any violation hereof shall subject the offender to a penalty of twenty-five dollars, and to the like penalty for every day such violation shall continue, after notice from the marshal or street commissioner of the proper division to remove the same."

It also appeared in evidence that the original ordinance from which the foregoing provision is taken, was passed May 3d, 1855, but, as then passed, did not allow of more than four feet encroachment upon the sidewalk in any case. On the 7th of February, 1856, the ordinance was amended by the City Council to read as above.

Is Robbins, under the law and evidence, answerable over to the city for the judgment recovered by Woodbury?

It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer. If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it.

An express notice to him to defend the suit was not necessary in order to charge his liability: *Barney* vs. *Dewey*, 13 Johns. 226; *Warner* vs. *McGany*, 4 Vt. 500; *Beers* vs. *Pinney*, 12 Wend. 309.

He knew that the case was in Court; was told of the day of trial; was applied to to assist in procuring testimony, and wrote to a witness, and is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity.

Robbins is not, however, estopped from showing that he was

under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened. It is insisted that inasmuch as Robbins had no express permission from the city to encroach on the street, that he was engaged in an unlawful work, and the digging of the area was in itself a nuisance. So far as the city impliedly could give authority to make this area, it was given; the corporation undoubtedly knew that this area was in process of construction, and that many similar ones had been built since the grade of the city was raised, and yet no objection was ever interposed. Areas, like the one in controversy, are convenient to the owners of adjoining buildings, and useful in affording light and air, and if during their construction they are properly guarded and protected, they are no essential hindrance to the public in their right of transit over the streets. The public have a right to the free passage of the streets, and yet that right cannot always be enjoyed. Improvements could not be made in a large city; houses could not be built, or repaired even, without the streets being at some time obstructed. In *Commonwealth* vs. *Passmore*, 1 S. & R. 217, the Supreme Court of Pennsylvania say: "It is true that necessity justifies actions which would otherwise be nuisances. It is true also that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stone into the street at pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner." "But these encroachments on a street must be reasonable, not continued longer than is necessary, and must be properly guarded and protected so as to secure the public against danger; and if these things do not concur, then they become nuisances, and can be abated:" *Clark* vs. *Fry*, 8 Ohio R. 359.

Was the building of this area a necessary encroachment on the street; and if so, were the proper steps taken to secure it so as to protect the public from injury? The fact that an improvement

may become dangerous, and involves great hazard, is no argument against the propriety of making it. If, by great care and more than ordinary diligence, it can be made, and the public saved from harm, and it is also necessary, then the right to make it is solved. The grade of the city was doubtless raised to secure light and air to basements, to get good cellars, and for purposes of drainage. The value of property in a city is much enhanced by the erection of solid and durable buildings, and every proper facility to perfect them should be given to builders. If it is necessary, in order to make a better building, to occupy the sidewalk and dig an area, and it can be occupied, and the area dug and secured without danger to the public, then the encroachment made on the street is reasonable, and the work lawful. But in every improvement like the one we are considering, it is essential that every possible precaution should be used against danger. No precaution whatever was used in this case. The area was left uncovered, without guards and lights to warn those who passed by, and a serious accident was the result. If an area is left open it is dangerous and is a nuisance, and can be abated: *Dygett* vs. *Schenck*, 23 Wend. 446; *Congreve* vs. *Morgan & Smith*, 18 N. Y. 84; *Storrs* vs. *City of Utica*, 17 Id. 108; *Coupland* vs. *Hardingham*, 3 Campbell 398.

The city must be reimbursed, unless it has been itself in fault. The rule of law is, that one of two joint wrongdoers cannot have contribution from the other. It is difficult in this case to see how the city was to blame, and least of all how Robbins can impute blame to it. Robbins desired to erect a large storehouse, and, to add to its convenience, wished to excavate the earth in the sidewalk in front of his lot. Without express permission from the city, but under an implied license, he makes the area. No license can be presumed from the city to leave the area open and unguarded even for a single night. The privilege extended to Robbins was for his benefit alone, and the city derived no advantage from it, except incidentally. Robbins impliedly agreed with the city, that if he was permitted to dig the area, for his own benefit, that he would do it in such a manner as to save the public from danger, and the city from harm. And he cannot now say, that true it is you gave

me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition. If this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decision from the rights of private persons. Because the city is liable primarily to a sufferer by the insecure state of the streets, offers no reason why the person who permits or continues a nuisance at or near his premises should not pay the city for his wrongful act. The city gave no permission to Robbins to create a nuisance. It gave him permission to do a lawful and necessary work for his own convenience and benefit, and if, in the progress of the work, its original character was lost, and it became unlawful, the city is not in fault. We can see no justice or propriety in the rule, that would hold the city under obligation to supervise the building of an area such as this.

But the defendant maintains "that the owner of a lot who employs a competent and skilful contractor (exercising an independent employment) to erect a building on his lot, is not liable to third persons for injuries happening to them by reason of the negligence of such contractor in the prosecution of the work," and that this area was not such a nuisance as rendered him liable. How far owners of real estate or personal property are answerable for injuries which arise in carrying into execution that which they have employed others to do, has been a subject much discussed in England and this country since the case of *Bush* vs. *Steinman*, 1 Bos. & Pul. 404. All the cases recognise fully the liability of the principal where the relation of master and servant or principal and agent exists; but there is a conflict of authority in fixing the proper degree of responsibility where an independent contractor intervenes. We are not disposed to question the correctness of the rule contended for by the defendant as an abstract proposition. The rule itself has, however, limitations and exceptions, and we cannot see that it is applicable to this case.

"If the owner of real estate suffer a nuisance to be created or continued by another on or adjacent to his premises, in a prosecu-

tion of a business for his benefit, when he has the power to prevent or abate the nuisance, he is liable for an injury resulting therefrom to third persons:" *Clark* vs. *Fry*, 8 Ohio R. 359; *Ellis* vs. *Sheffield Gas Consumers' Company*, 2 E. & B. (75 E. C. L. R.) 767.

This area when it was begun was a lawful work, and if properly cared for it would always have been lawful; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot for whose benefit it is made is responsible. He cannot escape liability by letting work out like this to a contractor, and shift responsibility on to him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large city, and left without guards and lights at night, without great danger to life and limb; and he who orders it dug, and makes no provision for its safety, is chargeable, if injury is suffered.

It is said that Robbins did not reserve control over the mode and manner of doing the work, and is not therefore liable; but the digging this area necessarily resulted in a nuisance—was the result of the work itself—unless due care was taken to make the area safe.

This is a clear case of "doing unlawfully what might be done lawfully; digging earth in a street without taking proper steps for protecting from injury:" *Newton* vs. *Ellis*, 5 E. & B. (85 E. C. L. R.) 123.

"If the owner of real estate builds an area in front of his store, he must at his peril see that the street is as safe as if the area had not been built:" *Congreve* vs. *Morgan & Smith*, 18 N. Y. 84.

The privilege of making the area was a special favor conceded to Robbins alone, as the owner of the lot, and "it is a familiar principle that when one enjoys a privilege in consideration that he alone can enjoy the benefit, he is required to use extraordinary care in the exercise of that privilege:" *Nelson* vs. *Godfrey*, 12 Illinois 20.

Robbins, in the exercise of his privilege, did not use even ordinary care. There is no provision in his contract with Button, nor with the men who laid the flagging or put on the iron grating, that

they should provide proper lights and guards. What Button failed to do, by which he is chargeable with negligence, does not appear in the evidence. And Robbins, although repeatedly warned, and having daily supervision over the work by his architect and superintendent, suffers this nuisance to be continued. A case of grosser negligence could hardly be imagined. In the heart of a large city, the owner of a valuable lot, being desirous of adding to the value of a large iron building that he is about to erect by the license (to be inferred, not expressed) of the corporation, digs an area; leaves it open, without guards or lights; fails to provide with his contractor for the very matter which, if left undone, would make it a nuisance; is told of the dangerous condition of the area; has a direct supervision over it by his superintendent, and yet, when an injury is suffered by the very nuisance which he has created for his own benefit, and continued, insists that he is not in fault; that if blame attaches anywhere, it is to his contractor. If the owner of fixed property is not responsible in such a case as this, it would be difficult ever to charge him with responsibility.

In the cases which were cited by the defendant's counsel, and relied on, was the case of *Hilliard* vs. *Richardson*, 3 Gray 349, and the case of *Scammon et al.* vs. *The City of Chicago*, 25 Illinois 424.

Hilliard vs. *Richardson* was a most elaborate and able discussion of the doctrine of *respondeat superior*, and the authorities in this country and England were fully reviewed, and we see no reason to question the conclusion at which the court arrived. But that case and the one at bar were not at all alike. That was a case where the owner of a building contracted with a carpenter at an agreed sum to repair it, and a teamster, who was employed by the carpenter to haul boards, left them in the street in front of the lot, and an accident happened. The teamster, when he placed boards in the street, was engaged in a work collateral to that which the owner contracted for—the repair of the building—and in no sense can the injury be said to happen from the doing of that defectively which the owner directed to be done. The owner was correctly not held liable, and one of the grounds on which that court place their

decision was, "that it was not a nuisance erected by the owner of the land, or by his license, to the injury of another."

The case of *Scammon* vs. *The City of Chicago* is similar in many of its facts to this case, and is decided differently. That Court held, as we do, that if the "nuisance necessarily occurs in the ordinary mode of doing the work the occupant or owner is liable, but if it is from the negligence of the contractor or his servants, then he should alone be responsible." But the court also held that "the omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work," a rule to which we cannot assent, and which we think is opposed by reason and authority.

It was urged at the bar that this Court in such cases follows the decision of the local courts. Where rules of property in a State are fully settled by a series of adjudications, this Court adopts the decisions of the State Courts. But where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions. Testing the question of the correctness of the charge of the judge of the Circuit Court to the jury by the rules and principles we have discussed and established, was there or not error in it?

The following language was used by the judge in his charge, and was excepted to by the city. "If, then, the contractors were in possession and control of the premises with their servants and agents, and were, in their employment, independent of the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows, from what has been said, that he could not be held responsible for it." This instruction, in a case where the facts warranted, might have been properly given. But it did not arise out of the facts of this case; was inapplicable to them; was calculated to confuse and mislead the jury on the question of Robbins's liability: and must have misled them, and should not have been given. A broad rule was laid down, when the very case itself furnished an exception. Robbins's duty was absolute to see that the area, dug under his direction and for his

benefit, should be safely and securely guarded, and failing to do so, his liability attached, and the jury should have been told so. The city also excepted to so much of the said charge of the Court, as leaves the question of joint negligence on the part of the plaintiff and defendant to the jury. The city was not in fault, and this exception was properly taken.

The judgment below is reversed, with instructions to award a *venire de novo*.

Supreme Court of Illinois.

JAMES B. GORTON, APPELLANT, *vs.* JOHN M. BROWN, APPELLEE.

An action on the case will not lie for improperly causing a writ of injunction to be issued. The remedy is on the injunction bond.

The case of *Cox* vs. *Taylor's Administrators*, 10 B. Monroe 17, not recognised as authority.

This was an action of trespass on the case. The declaration charges, that the appellant, on the 30th day of October, 1854, falsely, maliciously, and without any reasonable or probable cause whatsoever, filed his bill of complaint on the chancery side of the Lake Circuit Court, and at the same time falsely, maliciously, and without any reasonable or probable cause whatever, caused to be issued out of, and under the seal of said court upon said bill, and the indorsement of the master in chancery of said county thereon, a writ of injunction against and to the said appellee, Brown, whereby he, the said Brown, was restrained and enjoined from selling, or in any way or manner disposing of, or interfering with a certain lot of lumber which was in said injunction alleged to be owned by said Brown and Gorton as partners. Also enjoining said Brown from collected any debts due on account of any of said lumber which had been sold on credit; which said injunction was, on or about the day of the issue thereof, served on said Brown.

Declaration also charged, that at and before time of filing said bill, said Brown was engaged in the lumber trade. That he had